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IN THE

SUPREME COURT OF THE UNITED STATES

No. 98-9828

OCTOBER TERM, 1999

MARIA SUZUKI OHLER,

Petitioner,

- vs -

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF IN OPPOSITION TO THE BRIEF FOR THE UNITED STATES

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> No person shall be held to answer for a capital, or otherwise infamous crime, unless presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

Sixth Amendment 17

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

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REPLY BRIEF IN OPPOSITION TO THE BRIEF FOR THE UNITED STATES

Petitioner, Maria Suzuki Ohler, respectfully submits this reply to the Brief for the United States in Opposition ("OB") to her petition for a writ of certiorari. Despite the government's contentions, the instant petition raises an issue which is the subject of a "square" conflict among the federal courts of appeal. Moreover, this case provides an excellent vehicle for resolving this conflict.

BACKGROUND

The government accurately portrays the factual and procedural background of the case; however, petitioner wishes to set forth the district court proceedings in a bit more detail so as to clarify a few points.

Two weeks before trial, on January 13, 1998, the government filed a motion in limine to admit petitioner's 1993 conviction for possession of methamphetamine under Rule 609(a)(1). CR 23; ER at 11-13.[1] The motion in limine stated: "The Government hereby notifies Defendant of its intention to offer the following conviction at trial under Federal Rule of Evidence 609(a)(1): Defendant was convicted of the felony offense of Possession of a Controlled Substance, in violation of California Health and Safety Code Section 11377(A), on June 29, 1993, and sentenced to 90 days jail and three years probation. Therefore, if Defendant testifies, the Government intends to use this conviction to impeach her." CR 23; ER at 11. One week later, on January 20, 1998, petitioner filed a written submission in which she objected to the government's motion in limine. CR 24; ER at 34.

On January 26, 1998, the district court held a hearing to resolve the various motions in limine that had been filed. CR 27; ER at 66. At that time, petitioner again "object[ed] to the use of th[e] prior conviction under [Rule] 609." ER at 91. In response, the government argued that use of the prior conviction to impeach petitioner was "something that's important and critical to the Government's case . . . ." ER at 93. The district court deferred ruling on the motion so that the parties could submit supplemental briefing. ER at 97. Also at the hearing, in denying one of the government's other requests, the district court did tell the prosecutor that it could revisit that other

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[1] "CR" refers to the Clerk's Record and is followed by the entry number of the cited document as it appears in the district court docket sheets. The district court docket sheets appear on pages 267-74 of the Excerpts of Record ("ER") submitted by petitioner to the United States Court of Appeals for the Ninth Circuit.

particular issue and that it "always keep[s] an open mind." ER at 100.

On January 27, 1998, petitioner filed a supplemental brief in which she continued to object to the government's request to admit her prior conviction under Rule 609. CR 29; ER at 41, 44-46. The government also filed a supplemental brief. CR 30; ER at 59-65. Trial began the next day, January 28, 1998. ER at 103. At the beginning of the proceedings, the district court entertained further argument on the Rule 609 issue. ER at 108-14. Petitioner continued to object to the admission of her prior conviction under Rule 609. Id.

After two sets of briefing and two rounds of oral argument, the district court finally stated: "All right. I think I've heard the arguments at this point . . . I do think we do need to get this issue resolved." ER at 114-15 (emphasis added). The district court then definitively held that petitioner's prior conviction was admissible under Rule 609 with an explanation that amounted to almost two pages of transcript and never once indicated that it was subject to reconsideration. ER at 115-16. At the outset of its ruling, the district court commented: "Well, I will say at the threshold that this is a very close call. You may not see it as such, but it is a close call." ER at 115. The district court was troubled as to whether drug crimes involving simple possession, as opposed to distribution, are probative of veracity for purposes of Rule 609 and seemed to want some guidance from the Ninth Circuit, as it queried: "Perhaps one day we will get a refinement of [United States v.] Alexander[, 48 F.3d 1477, 1488 (9th Cir. 1995)] and perhaps a distinction, if a distinction is to be made, between personal use convictions and other types of drug convictions." ER at 115. Nevertheless, the district court firmly ruled that the conviction was admissible. Petitioner ultimately testified in her own defense and admitted the prior conviction on direct examination to remove the sting of the imminent cross-examination.

This background clarifies a few important considerations. First, at one point in its

brief, the government asserts that petitioner "raised no objection, either before or during her testimony, to the admission of her prior conviction." OB at 3 (emphasis added). Petitioner assumes that the use of the word "before" means immediately before her testimony, as the above background clearly demonstrates that petitioner fiercely litigated the Rule 609 issue before trial. Admittedly, petitioner did not renew her objection immediately before her testimony, but that was because the district court had definitively ruled on the issue. Indeed, despite the government's effort to cast the decision as tentative or subject to change by claiming that the district court "always ke[pt] an open mind[,]" OB at 3, the district court prefaced its definitive Rule 609 ruling by stating, "I do think we do need to get this issue resolved." ER at 115. The district court then did just that; it definitively resolved the issue.

In addition, given the posture of the Rule 609 issue, there was no doubt that the government intended to introduce the prior conviction to impeach petitioner. The government initially raised the issue by affirmatively moving to admit the conviction and vigorously argued for its admission in two sets of papers and two rounds of oral argument. At no point during all of this argument did the government indicate that it was uncertain as to whether it would admit the conviction if given permission. To the contrary, the government emphasized that use of the conviction to impeach petitioner was something that was "important and critical" to its case. ER at 93.

ARGUMENT

The government essentially makes three arguments as to why the petition for a writ of certiorari should be denied: (1) the Ninth Circuit's decision that petitioner could not appeal the district court's pretrial decision to allow the government to impeach her with her prior conviction under Rule 609 because she testified about the conviction on direct examination is in accord with

the Court's decision in Luce v. United States, 469 U.S. 38 (1984); (2) while there is some "tension" among the courts of appeal regarding the Ninth Circuit's refusal to entertain the merits of the district court's Rule 609 ruling under these circumstances, there is not a "direct circuit conflict" warranting clarification; and (3) even if the Ninth Circuit had entertained the merits of the Rule 609 ruling, it would have affirmed the district court. Petitioner will respond to the government's contentions in order.

I.

In Luce, a criminal defendant, Luce, "moved for a ruling to preclude the Government from using a 1974 state conviction to impeach him if he testified. There was no commitment by [Luce] that he would testify if the motion were granted, nor did he make a proffer to the court as to what his testimony would be." Luce, 469 U.S. at 39.[2] The district court denied his motion but explained "that the nature and scope of [Luce's] trial testimony could affect [its] specific evidentiary rulings; for example, the [district] court was prepared to hold that the prior conviction would be excluded if [Luce] limited his testimony to explaining his attempt to flee from the arresting officers. However, if [Luce] took the stand and denied any prior involvement with drugs, he could then be impeached by the 1974 conviction." Id. at 40. Luce did not testify and, after losing at trial, attempted to appeal the district court's Rule 609 ruling. Id. The court of appeals refused to entertain the merits of his claim, and the Court affirmed. Id.

In explaining its affirmance, the Court's leading rationale was that an appellate court is "handicapped" in reviewing such an evidentiary claim without the factual context of the

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[2] It is not entirely clear whether Luce's motion was made before trial or during trial. The Court, however, characterized the motion as a motion in limine, using that "term in a broad sense to refer to any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered." Id. at 40 n.2.

defendant's testimony. Id. at 41. In particular, the Court explained that a reviewing court cannot determine whether any evidentiary error that may have been committed in admitting the prior conviction was harmless. Id. at 42.[3] Clearly, this leading rationale is not applicable in this instance. Here, petitioner testified at trial, and thus there is a full record, or a complete factual context, by which a reviewing court can conduct appellate review of the evidentiary ruling.

As a secondary, case-specific rationale, the Court also explained that an appeal should not lie because an in limine "ruling is subject to change when the case unfolds" and "[o]n a record such as here, it would be a matter of conjecture whether the District Court would have allowed the Government to attack [Luce's] credibility at trial by means of the prior conviction." Id. at 41-42 (emphasis added). Similarly, the Court reasoned that a "reviewing court also has no way of knowing whether the Government would have sought to impeach with the prior conviction. If, for example, the Government's case is strong, and the defendant is subject to impeachment by other means, a prosecutor might elect not to use an arguably inadmissible prior conviction." Id. at 42. These case-specific reasons are not applicable in this instance. First, the district court definitively ruled that petitioner's prior conviction was admissible and did not in any way indicate that its ruling could change. In fact, the district court believed that it "needed" to resolve the issue when it did, on the morning of the first day of trial. In other words, rather than wanting to wait to decide the issue, the district court wanted to make a clear and immediate ruling. Second, there was no doubt that the government intended to use the prior conviction in this case, as the government affirmatively moved to admit petitioner's prior conviction (as opposed to Luce, who moved to exclude his). In addition,

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[3] The Court noted that allowing a defendant to make a proffer as to what his testimony would be does not solve this problem because "his trial testimony could, for any number of reasons, differ from the proffer." Id. at 41 n.5.

in the four sets of written and oral arguments made by the government, it never expressed any doubt about its intention to use the conviction and even characterized use of the prior conviction as important and critical to its case.

Perhaps more importantly, the secondary, case-specific concerns articulated in Luce can easily be allayed under the instant circumstances without the drastic solution of an appellate waiver. Indeed, Professor Saltzburg has offered a practical, easy solution:

> A Trial Judge justifiably might wish to hear the defendant's direct testimony before ruling finally on the scope of impeachment. The Trial Judge can do this, however, without putting the defense to the unfair choice describe above [introducing a prior conviction that may not be admitted or appearing as if it is hiding facts from the jury] by reserving a final ruling until near the end of the defendant's direct examination. At that point, the Judge can inquire of the government as to whether it still intends to use prior convictions and can rule finally on their admissibility. If the government chooses to forego their use, they need not be mentioned. If, however, the government expresses an intent to offer them, they should be available to the defense to offer, without waiver of the right to appeal, so that the defendant may avoid an adverse reaction from the jury if it learns of the convictions only after the defense has passed the witness.

1 Stephen A. Saltzburg et al., Federal Rules of Evidence Manual, at 37 (7th ed. 1998).[4] For these reasons, while a defendant's failure to testify may be cause for an appellate waiver of a Rule 609 ruling, the situation presented by the instant petition is not. In short, despite the government's contentions, the Court's reasoning in Luce does not support the Ninth Circuit's decision in this case.

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[4] Of course, the scenario described by Professor Saltzburg did not occur here, but that was because the district court made a definitive ruling without expressing a desire to hear petitioner's testimony first, and the government had already made its intention to introduce the conviction clear.

II.

A "compelling reason" exists to grant a petition for a writ of certiorari when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter . . . ." Sup. Ct. R. 10(a). The government does not contend that the issue raised by petitioner is not an "important matter" and also acknowledges that "there is some disagreement in the courts of appeals" on the issue. OB at 8. The government, however, claims that "there is no square conflict that merits this Court's review." Id. (emphasis added). Although the "disagreement" acknowledged by the government should be enough to merit the granting of the instant petition, there is nonetheless a "square" circuit-split, despite the government's contention, warranting review. Indeed, within the last two years, the Fifth and Seventh Circuits have rendered decisions that "squarely" conflict with the Ninth Circuit's decision in the instant case. See Wilson v. Williams, 182 F.3d 562, 566-67 (7th Cir. 1999) (en banc); United States v. Fisher, 106 F.3d 622, 629 (5th Cir. 1997).

Most recently, in Wilson, the Seventh Circuit specifically rejected the rule articulated by the Ninth Circuit in this instance and held that a litigant does not waive an adverse decision on a Rule 609 in limine motion by attempting to remove the sting of the ruling by informing the jury of the prior conviction. Judge Easterbrook, writing for an en banc Seventh Circuit, explained:

> Trial-time adaptions are benefits of pretrial rulings on evidence, so it follows that adaptions do not waive positions already staked out. Plaintiff did not surrender his objection by making the best he could of his situation after the judge's adverse ruling. See Judd v. Rodman, 105 F.3d 1339 (11th Cir. 1997). Although some courts have held that a litigant who loses an evidentiary ruling and then offers the evidence himself has waived an opportunity to complain about the decision in limine, see United States v. Williams, 939 F.2d 721, 723 (9th Cir. 1991); Gill v. Thomas, 83 F.3d 537, 540 (1st Cir. 1996), this approach gives up one of the principal benefits of the pretrial-ruling procedure, and we therefore do not follow it.

Wilson, 182 F.3d at 566 (emphasis added). The emphasized language cannot be more of an indication that the Seventh Circuit rejected the Ninth Circuit's approach and thereby created a "square" conflict.[5]

The government attempts to blunt the "square" conflict by arguing that the Seventh Circuit's rejection of the Ninth Circuit's appellate waiver rule only applies to definitive rulings. The government also claims that the district court's ruling in this case was tentative, and therefore the instant case does not generate a "square" conflict with the Seventh Circuit. As has already been explained, the government's factual assertion is simply wrong -- the district court wanted to make a definitive pretrial ruling and did make such a ruling. More importantly, the state of the law in the Ninth Circuit, as articulated in Williams and Ohler, is that even if a district court makes a definitive Rule 609 ruling, a litigant cannot appeal the decision if he attempts to remove the sting. Indeed, the Ninth Circuit, in describing the district court's decision in the instant case, did not indicate any tentativeness: "On the morning of the first day of [petitioner's] trial, th[e] district court concluded that, if [petitioner] were to testify on her own behalf, evidence of her past criminal conviction would be admissible under Rule 609(a)(1) to impeach her credibility." Ohler, 169 F.3d at 1201. The bottom line is this: in the Ninth Circuit, under Ohler, even if a district court makes a definitive decision to allow a prior conviction to be introduced under Rule 609, a litigant waives the right to appeal that decision if he attempts to remove its sting. This rule "squarely" conflicts with the Seventh Circuit.[6]

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[5] While the Seventh Circuit did not cite United States v. Ohler, 169 F.3d 1200 (9th Cir. 1999), the Ninth Circuit's decision underlying the instant petition, it did cite the Ninth Circuit's decision in Williams, which stood as the basis for Ohler.

[6] The government also contends that this case does not present a "square" conflict because the Seventh Circuit only allows a litigant to appeal after he removes the sting of an

Not only does the Ninth Circuit's rule "squarely" conflict with the Seventh Circuit, it also "squarely" conflicts with the Fifth Circuit. In Fisher, the Fifth Circuit, like the Seventh Circuit, explicitly rejected the appellate waiver rule articulated by the Ninth Circuit in Williams, and later in Ohler, and explained:

> [The government] first argues [defendant] waived his right to appeal the use of the conviction since he introduced it in direct examination, relying on United States v. Williams, 939 F.2d 721 (9th Cir. 1991), Shorter v. United States, 412 F.2d 428 (9th Cir. 1969), cert. denied, 396 U.S. 970 (1969), and United States v. Cobb, 588 F.2d 607, 613 (8th Cir. 1978), cert. denied, 440 U.S. 947 (1979).
>
> However, the Fifth Circuit has held a party is not prohibited from introducing evidence in direct examination when the trial court has already ruled the evidence may be introduced on cross examination. Reyes v. Missouri Pac. R.R. Co., 589 F.2d 791 (5th Cir. 1979). . . .
>
> Following our Reyes holding, we decline to agree that when opposing counsel obtains a ruling allowing it to introduce damaging evidence on cross, the affected party who attempts to anticipate that negative evidence waives his right to object to the introduction of that testimony by himself raising it. Clearly, no defendant would introduce damaging testimony unless he feared he would be more injured by the jury first hearing of that evidence from the prosecution. When the Government obtains a ruling in advance allowing it to introduce prior conviction evidence, the defendant is faced with a difficult dilemma: to refrain from testifying in his own defense, or risk impeachment by the opposite side. A holding that, under these facts, a defendant who testifies in anticipation automatically waives his right to object to a trial court's ruling admitting the damaging

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unconditional, adverse ruling and that, in this case, the district court only made a conditional ruling because it determined that the prior conviction was admissible if petitioner testified. The government fails to understand what the Seventh Circuit means by a conditional ruling in this context. In the Rule 609 context, the ruling only remains conditional, and thus unappealable, if the defendant does not testify. See Wilson, 182 F.3d at 565 (citing Luce, 469 U.S. 38). In this instance, however, the conditional ruling became unconditional the moment petitioner took the stand. In other words, at the time petitioner attempted to remove the sting, the district court's ruling was no longer conditional because the only condition precedent to the admission of the prior conviction had been satisfied.

> evidence goes against basic notions of fairness. Therefore, when the prosecution obtains, over objection, a ruling in limine that it may use evidence of an earlier conviction if the defendant testifies, the defendant who introduces evidence of the conviction, later found to be constitutionally infirm, in direct examination in an effort to ameliorate the highly prejudicial effect of that evidence, should not be deemed to have waived objection to the erroneous introduction of such evidence.

Fisher, 106 F.3d at 629 (parallel citations omitted). Despite this rather clear indication of a "square" conflict, the government contends that Fisher is limited to unusual facts, in that the prior conviction that was ruled admissible was later overturned as unconstitutional. While the Fifth Circuit did mention that the prior conviction had been overturned at the very end of its detailed explanation as to why it was rejecting the Ninth Circuit's appellate waiver rule, the above, lengthy quotation demonstrates that the government improperly contends that the Fifth Circuit "explicitly limited" its holding to those circumstances.

Perhaps recognizing that the holding in Fisher was not "explicitly limited," the government contends that the Fifth Circuit has simply adhered to its pre-Luce precedent, as established in Reyes, and has not considered the ramifications of Luce.[7] As previously argued, however, the primary reasoning in Luce, the inability to conduct appropriate appellate review on a blank factual record, is not applicable to the instant situation, and therefore the failure to mention

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[7] The government raises a similar, unpersuasive complaint about the Second Circuit's decision in United States v. Puco, 453 F.2d 539, 541 (2d Cir. 1971), which is in accord with the Fifth and Seventh Circuits. The government also argues that the Second Circuit has implied that Luce altered its previous holding in Puco but selectively parses language from two opinions that have nothing to do with the issue before the Court and do not even mention Puco. See OB at 8 (citing Palmieri v. Defaria, 88 F.3d 136, 139 (2d Cir. 1996) and Rosenfeld v. Basquiat, 78 F.3d 84, 90 (2d Cir. 1996)).

Luce in Fisher is inconsequential.[8]

In sum, the Ninth Circuit's decision below creates a "square" conflict with the Second, Fifth, and Seventh Circuits. In addition, as the government points out, the decision also may create a conflict with the Eleventh Circuit, which appears to be aligned with its predecessor circuit, the Fifth. See Judd v. Rodman, 105 F.3d 1339, 1342 (11th Cir. 1997); cf. United States v. Pritchard, 973 F.2d 905, 908 (11th Cir. 1992). Despite the government's contentions, there is not a mere "disagreement" (if there is such a thing) among the circuits; rather, there is a "square" conflict between the First, Sixth, Eighth, and Ninth Circuits on one side, and the Second, Fifth, Seventh, and perhaps Eleventh Circuits on the other. This conflict requires clarification by the Court.

III.

The government's final reason for denying the petition is that petitioner's convictions would not have been reversed even if the merits of the Rule 609 issue had been addressed, as the Ninth Circuit would not have found that the district court abused its discretion in reaching its decision. This argument is flawed for several reasons.

First, whether petitioner's convictions will ultimately be reversed is not a significant

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[8] The government also contends that the Fifth Circuit's law is unclear because one post-Luce Fifth Circuit decision conflicts with Fisher. See OB at 9 (citing United States v. Galvan-Garcia, 872 F.2d 638, 640 (5th Cir. 1989)). First, the government's description of Galvan-Garcia as a post-Luce decision is inconsequential, as the Fifth Circuit did not even cite Luce in the opinion. More importantly, Fisher actually addresses the government's claim regarding Galvan-Garcia: "Insofar as Galvan-Garcia suggests that a defendant waives any objection to the introduction of impeachment evidence when he offers evidence of prior convictions on direct examination, following an adverse ruling on a motion in limine concerning the admissibility of such prior convictions, we decline to follow that suggestion. As we have already explained, our decision in Reyes holds that a motion in limine is sufficient to preserve for appeal under such circumstances, and we reaffirm that holding today." Fisher, 106 F.3d at 630 n.7 (citations omitted). This footnote in Fisher further refutes the government's contention that the decision is specifically limited to its facts.

factor in determining whether the instant petition should be granted. "As the Court has observed in the past, 'it is very important that [it] be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.'" Powell v. Nevada, 511 U.S. 79, 86-87 (1994) (Thomas, J., dissenting) (quoting Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923)). In other words, in determining whether to grant the instant petition for a writ of certiorari, the Court should be mainly concerned with settling the conflict among the lower courts regarding the issue presented, not in the actual outcome of the dispute between the litigating parties.

Even if the ultimate outcome of the merits of the Rule 609 determination were a significant concern in determining whether to grant the instant petition, the Court should not be persuaded by the government's contention that the Ninth Circuit would have affirmed because the district court's decision to admit the prior conviction was correct.[9] As an initial matter, despite the fact that courts of appeal often express a viewpoint on the merits of an issue even though they find that the issue has been waived, the Ninth Circuit in no way indicated that the district court's decision was correct in this particular instance. See Ohler, 169 F.3d at 1204 ("Because Ohler waived her right to appeal the district court's in limine ruling, we need not decide whether the district court erred

[9] Interestingly, before the Ninth Circuit, the government did not argue for affirmance of petitioner's convictions because any error in admitting her prior conviction was harmless; instead, the government simply contended that the Rule 609 issue had been waived and that the district court nevertheless correctly admitted the prior conviction. Likewise, in its response to the instant petition, the government does not make a harmless error argument. By not making such an argument, the government apparently concedes that any error in admitting the prior conviction was harmful. Ironically, the main reason underlying the Court's adoption of the appellate waiver rule in Luce, the inability to conduct harmless error review, is not implicated whatsoever in the instant case.

when it determined that Ohler's prior conviction for possession of methamphetamine was admissible for impeachment purposes under Rule 609(a)(1) of the Federal Rules of Evidence."). By failing to even comment on the merits of the issue, one could infer that the Ninth Circuit was at least troubled by the district court's ruling. Moreover, as set forth in the background section of this brief, the district court was troubled by the issue, thought that it was a very close call, and sought guidance from the Ninth Circuit.

Despite the Ninth Circuit's unwillingness to entertain the merits of the Rule 609 issue and the district court's statement that it was presented with a difficult, close call, the government apparently believes that an affirmance on the merits is inevitable in this instance, as it would be in most cases, because the standard of appellate review is abuse of discretion.[10] The Court, however, has recently emphasized that "an abuse of discretion standard does not mean a mistake of law is beyond appellate control. A district court by definition abuses its discretion when it makes an error of law." Koon v. United States, 518 U.S. 81, 100 (1996) (citations omitted). In this instance, the district court erroneously applied the relevant legal standard governing the admissibility of a criminal defendant's prior conviction under Rule 609 and therefore abused its discretion. Although, given the nature of the issue presented to the Court, petitioner does not believe that it is necessary to recreate in full the arguments that she articulated to the Ninth Circuit as to why the district court erred in making its Rule 609 ruling, she will briefly explore the merits of the issue.

As an initial matter, although the district court properly cited the five-part test set forth in United States v. Browne, 829 F.2d 760, 762-63 (9th Cir. 1987) for determining the

[10] If the government is correct that district courts will rarely be reversed on Rule 609 issues because of the abuse-of-discretion standard, one is left to wonder whether there is even a need for an appellate waiver rule. In other words, if district courts will routinely be affirmed, why be so squeamish about reviewing the merits of the issue?

admissibility of a prior conviction under Rule 609,[11] it failed to recognize that, when considering these factors, the Ninth Circuit requires that the probative value of the prior conviction substantially outweigh its prejudicial effect. Id. In this case, when considering the five factors, the probative value of petitioner's prior conviction does not even outweigh, let alone substantially outweigh, its prejudicial effect.

The first, second, third, and fifth factors are, even when viewed in a light favoring admissibility, neutral. As to the first factor, while it is true that the Ninth Circuit has stated that prior convictions for drug distribution are probative of veracity, see United States v. Cordoba, 104 F.3d 225, 229 (9th Cir. 1997); United States v. Alexander, 48 F.3d 1477, 1488 (9th Cir. 1995), it has never held that simple drug possession, the prior conviction at issue here, is probative of veracity. Indeed, the district court struggled with this factor, and other circuits have suggested that such prior convictions are not probative of veracity.[12] As to the second factor, petitioner's prior conviction occurred more than four years prior to the instant offense, and she successfully completed the three-year probationary sentence imposed. The third factor is again, in a light favoring admissibility,

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[11] Courts are to consider: (1) the impeachment value of the prior crime; (2) the point in time of conviction and the defendant's subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the defendant's credibility. Browne, 829 F.2d at 763.

[12] Cf. Wilson v. Union Pacific Ry. Co., 56 F.3d 1226 (10th Cir. 1995) (conviction for drug possession alone is not highly relevant to the issue of veracity); United States v. McDonald, 905 F.2d 871, 875 (5th Cir. 1990) (drug use is not probative of truthfulness); United States v. Bentley, 706 F.2d 1498, 1509-10 (8th Cir. 1983) (involvement in a drug operation is not necessarily indicative of a lack of truthfulness under the standard imposed by Rule 608); United States v. Reed, 700 F.2d 638 (11th Cir. 1983)(Possession of a small amount of marijuana does not shed any light on character for truthfulness); United States v. Johnson, 495 F.2d 242 (10th Cir. 1974) (defendant's possible involvement with heroin clearly lacked enough substantial relevance to outweigh its prejudicial effect and its admission was an abuse of discretion); Puco, 453 F.2d at 543 (narcotics possession convictions have little bearing on the veracity of the accused as a witness).

neutral, as both the prior conviction and the instant offense involved the same subject matter -- drugs. Finally, with respect to the fifth factor, petitioner's credibility was certainly at issue, for whenever a defendant testifies, her credibility is at issue. The fifth factor, however, is mainly concerned with those cases where "there is a clear cut conflict between the testimony of prosecution and defense witnesses so that someone has to be lying." 3 Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence § 609[03], at 609-40 (1996). In other words, the fifth factor is concerned with those cases where the issue will be "narrowed to the credibility of two persons -- the accused and his accuser," Gordon v. United States, 383 F.2d 936, 941 (D.C. Cir. 1967) (Berger, J.), and this was not one of those cases.

Given that the first, second, third, and fifth factors are, giving the government the benefit of the doubt, neutral, the fourth factor must strongly weigh in favor of admissibility. The fourth factor, however, clearly weighs against admissibility. The government, through its silence, concedes that the fourth factor, the importance of petitioner's testimony, weighs strongly against admission of the prior conviction. Indeed, "[t]he need for defendant's version of the events, 'unembarrassed by mention of his previous difficulties with the law,' is particularly great 'where inferences founded upon unexplained acts are likely to be heavily operative.'" 3 Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence § 609[03], at 609-40 (1996). In this case, petitioner needed to explain why she was driving a vehicle in which a large quantity of marijuana was hidden, as the jury would likely infer that she knew about the marijuana hidden in the vehicle if she did not provide an explanation. In sum, the overwhelming force of the fourth factor, when considering the weight of the other factors, dictates that the district court made an error of law, and thereby abused its discretion, when it determined that petitioner's prior conviction was admissible.

IV.

Finally, while the above analysis demonstrates that the instant petition should be granted because this case provides an excellent vehicle for resolving a "square" circuit-split, there is an additional, compelling reason for granting the petition: the Ninth Circuit's rule is wrong from both a statutory and policy perspective.

From a statutory perspective, Rule 103 of the Federal Rule of Evidence sets forth the requirements for claiming, on appeal, that an evidentiary ruling was in error. To challenge a decision to admit evidence, such as a prior conviction, a party merely needs to make "a timely objection or motion to strike . . . ." Fed. R. Evid. 103(a)(1). Rule 103 does not mention the appellate waiver rule created by the Ninth Circuit. Moreover, in 1990, Rule 609 was specifically amended to clarify that a party can introduce a prior conviction on direct examination in order to remove the sting of the forthcoming cross-examination. See Ohler, 169 F.3d at 1202. Rule 103, however, was not amended so as to require a party to forego this statutorily-sanctioned strategy in order to preserve a Rule 609 objection for appeal. In other words, the Ninth Circuit's rule is pure judicial invention.

From a policy perspective, several courts and commentators have discussed the unfairness of the Ninth Circuit's approach. See, e.g., Fisher, 106 F.3d at 629; Saltzburg, supra, at 37. Perhaps most notably, the approach requires the defendant not to mention his prior conviction during his testimony, and such silence "may be viewed by the jury as concealment of relevant facts." Id. Indeed, if a defendant chooses not to introduce evidence of the prior conviction during his direct examination, such a perceived "hide the ball" strategy will serve to undermine the integrity of both the defendant and his counsel before the jury. Id. Requiring a defendant and his counsel to look as if they are hiding facts from the jury in order to preserve a potentially meritorious issue on appeal offends traditional notions of fairness and improperly impinges on a defendant's Fifth and Sixth

Amendment rights to testify, to counsel, and to receive a fair trial.

In addition, the admission of a defendant's prior conviction is one of the most deadly weapons in a prosecutor's arsenal. Accordingly, a firm body of appellate case law should guide lower courts in determining when that deadly weapon may be used. Indeed, the district court in this instance was looking for guidance on the application of Rule 609. The Ninth Circuit's approach, however, practically halts the development of an appellate body of Rule 609 case law to guide lower courts in criminal cases.[13] There are already numerous hurdles that must be overcome in order to obtain a definitive appellate ruling on a Rule 609 issue. First, only defendants, not the government, can appeal a Rule 609 ruling. Second, defendants must properly object under Rule 103 or be subject to a plain error standard of review. Third, under Luce, defendants must testify. Fourth, appellate courts often avoid reaching the merits of a Rule 609 issue by directly proceeding to a harmless error analysis. Fifth, even if a case somehow manages to overcome all of these hurdles, definitive rulings are often clouded by an amorphous abuse-of-discretion standard of review. Thus, adding the Ninth Circuit's additional hurdle, which is a major one, practically ensures no further development in Rule 609 case law in the criminal context. Ironically, although the district court in this instance struggled with a "close call" and even sought appellate guidance, it was ultimately offered none by the Ninth Circuit.

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[13] The standard for the admissibility of a criminal defendant's prior conviction is different than the standard for other witnesses' prior convictions. See Fed. R. Evid. 609(a)(1).

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the Court grant the instant petition for a writ of certiorari as this case provides an excellent vehicle for resolving a "square" conflict among the circuits.

Respectfully submitted,

Dated: September 17, 1999

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